SERVED: September 1, 2005

NTSB Order No. EM-201

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of August, 2005

THOMAS H. COLLINS, Commandant, United States Coast Guard,	)	
v.	)	Docket ME-177
MICHAEL S. MOORE, Appellant.	)	

OPINION AND ORDER

Appellant seeks review of a decision of the Vice Commandant (Appeal No. 2652, dated February 11, 2005) affirming a decision and order entered by Coast Guard Administrative Law Judge Archie R. Boggs on July 31, 2003, following an evidentiary hearing conducted on January 17, 2003.[1] The law judge sustained a charge of misconduct -- specifically, refusal to submit to random drug

[1] Copies of the decisions of the Vice Commandant and the law judge are attached.

testing -- and ordered revocation of appellant's merchant mariner document. We deny the appeal, finding no basis in appellant's assignments of error for overturning the Vice Commandant's affirmance of the law judge's decision and order.

The misconduct charge at issue arose from appellant's failure to appear for a random drug test. Appellant is a self-employed commercial charter boat captain and member of the Mississippi Charter Boat Captains Association ("MCBCA"). MCBCA is responsible for administering the Department of Transportation (DOT) drug and alcohol testing program for its members, and, for this purpose, contracts for the services of Mississippi Drug Compliance ("MDC") to fulfill required random drug testing. MCBCA members are informed of the MCBCA/MDA procedure. See Exhibits ("Ex.") IO-1 and IO-2.

Judy Shaw, an employee of MDC, testified that on September 10, 11 and 12, 2002, she called the contact number listed for appellant,[2] and, when the call was answered by an answering machine, left a message that explained MDC had run a random drug screen for MCBCA, appellant's name was selected, and that

[2] Tammy Taylor, owner of MDC, testified that it was MDC's practice at the time to notify MCBCA members by telephone when they were selected for testing. Ms. Taylor testified that appellant had, on previous occasions, appeared for random testing when notified by MDC by telephone. The record indicates that those notifications were made by using the same telephone number that was used to contact appellant in this case.

appellant needed to appear for testing at MDC within 24 hours with the $47 testing fee. Appellant did not appear at MDC as requested.[3]

Appellant and his mother both testified that they did not receive the messages from MDC that were left on September 10th, 11th and 12th.[4] Additionally, appellant's mother testified that:

> My answering machine is very sensitive and if the lights just blink, everything is lost on it. And that happened frequently because of the weather. We live right on the bay and … during all of this time period the lights were constantly going off and on, so it's true that we probably lost many messages.

[3] Although not directly relevant to the Coast Guard's allegations, which expressly only referenced the MDC notifications between September 10th and 12th, Ms. Shaw also testified that when she returned to work on September 20th, and saw that appellant had not responded to MDC, she again called and again left a message for appellant. Ms. Shaw made contemporaneous notations on her list of randomly selected MCBCA members regarding her notification efforts. See Ex. IO-5. Ms. Taylor also testified about a contemporaneous notation she made on Ms. Shaw's notification roster sheet, dated September 27th, indicating that the president of MCBCA called appellant's cell phone and left a voice message stating that appellant needed to come into MDC by Monday, September 30th, or the matter would be turned over to the Coast Guard. Appellant, however, still did not appear at MDC in response to these calls. Of the 31 active MCBCA members selected for random testing, appellant was the only person not to respond to MDC.

[4] The contact number appellant provided for MCBCA/MDC was actually appellant's mother's house. It is not clear whether appellant resides there, but appellant does not dispute that the contact information used by MDC was accurate.

Transcript (Tr.) at 117-118. In addition, appellant's mother testified that during the time period between September 10th and September 27th, she "didn't hear any messages. My machine was in and out." Tr. at 119. Appellant's mother also explained that: "We had three hurricane scares around September. As a matter of fact … it was going on constantly during that time." Tr. at 112. Appellant also testified that in the period between September 10th and October 10th, there were two tropical storms and one hurricane that threatened the area.[5] Tr. at 133; Ex. R-B.

Appellant's mother testified that the only message she received on her machine seeking appellant to come in for a drug test was left on September 27th, and, after retrieving it late that evening, that she informed appellant about it the following morning. Appellant called MDC on September 28th, and the Coast Guard introduced the voicemail message appellant left for Ms. Taylor:

> This is Mike Moore. This Monday you can give me a call at [lists number]. Right now, both of my boats are inoperable. One's

[5] The newspaper accounts of the weather that appellant introduced as evidence indicate that the first storm to approach the area was tropical storm Hanna, on September 13th (i.e., after the MDC messages were left). See Ex. R-B ("Coast Braces for Hanna," The Sun Herald, September 14, 2002, p. A1; "All Eyes Are On Isadore," The Sun Herald, September 24, 2002, p. A1; "Lili Could Hit Gulf Coast By End of Week," The Sun Herald, September 30, 2002, p. A1).

> not even in the water and the other one is broke down and has been broke down for about 21 days now, so I'm not really worried about chartering at the moment, I'm just trying to get back running. I haven't really had time to be doing any drug testing 'cause I'm trying to get mechanical work done, but you can give me a call if I'm not greasy from head-to-toe trying to get this thing put back together with Kennedy Engine Company, I'll be more than happy to go down there and do my drug testing, but as of paying money for a drug test at the moment, I've been out of business for over a month, so I'm, that's the main concern as well, right now. I don't even have the money to pay for a drug test. Maybe the Coast Guard could pay for my drug test. So, um, give 'em a call and being as they want this drug test, see if they will pay for my drug test. If I can go use the rest room for free, I'd be more than welcome to do that at the moment. As of now, I'm practically bankrupt. So, please give me a call. We need to talk about financial matters, maybe I could pay you later. As of now, I am broke, so please give me a call.

Tr. at 48-51; Ex. IO-4.[6]

---

[6] Both appellant and appellant's mother testified that appellant was under considerable financial strain because his boats were inoperable and he was therefore unable to earn money from charters, and that appellant's mother was, essentially, supporting him during the month of September. Appellant had no further contact with MDC after he left the voicemail on September 28th, and, when asked at the hearing why he didn't subsequently come to MDC before the Coast Guard served the enforcement papers on him on Wednesday, October 2nd, appellant testified that, "on Monday I was cleaning up a bunch of stuff and working on my boat and it slipped my mind with everything that was going on. I had one big snowball going on since my boat broke down.... I didn't recollect the whole situation until [the Coast Guard] showed up at the door." Tr. at 145-146.

The law judge determined that the Coast Guard proved appellant refused to submit to required drug testing, and ordered revocation of appellant's merchant mariner document. In reaching his decision, the law judge found that the Coast Guard, "proved by a preponderance of the reliable and credible evidence that on September 10, 11, and 12, 2002, the MDC left telephone messages notifying Respondent that he was selected for a random drug test." The law judge also explicitly found that, "[c]ompared to MDC's efforts, [appellant's mother's] testimony surmising what could have happened to the answering machine messages is speculative, and lacks supporting documentation or corroboration. In this regard, her testimony was not credible but self-serving to Respondent." Appellant appealed the law judge's decision and order to the Vice Commandant, and, on February 11, 2005, the Vice Commandant denied appellant's appeal. In that decision, the Vice Commandant considered and rejected appellant's argument, among others, that there was insufficient evidence for the law judge to conclude that appellant was actually notified of the request to appear at MDC for the drug test.[7]

[7] The Vice Commandant also rejected appellant's other arguments, repeated by appellant on appeal and which we address herein.

On appeal, appellant, through counsel, reiterates the arguments he made below, namely that (1) the finding that appellant received sufficient notice to report for drug testing was not supported by substantial evidence; (2) in accordance with regulations, MDC was required to, but did not, "notify [appellant] that he … refused to test," and, therefore, an "indispensable element of the charge" was not proved; and (3) the sanction of revocation is excessive and was an unwarranted departure from the Coast Guard's own sanction guidance.[8]

Turning first to the issue of MDC's notice to appellant to report for drug testing, we discern no basis to disturb the Vice Commandant's affirmance of the law judge's determination that appellant was, in fact, provided actual notice by MDC on or about September 10th, 11th and 12th to report to MDC within 24 hours for DOT-required drug testing. In evaluating and weighing the testimony by appellant and appellant's mother that they did not receive the MDC messages left on September 10th, 11th and 12th, and appellant's mother's claim that any messages left on those dates likely had been lost prior to retrieval due to weather events, the law judge clearly rendered a credibility determination against those claims. Indeed, although not

[8] The Coast Guard filed a two-page reply brief that summarily states the Vice Commandant considered appellant's arguments, and his appeal is without merit.

directly relevant to the Coast Guard's charge, the law judge also permissibly considered, in the context of his credibility determinations, the additional claim by appellant and appellant's mother that another MDC message, left for appellant on September 20th, was also not received; as the law judge observed, these claims were "not credible," at least where, as here, they were not supported by any documentation.[9] As the Vice Commandant correctly observed, resolution of credibility is the province of the law judge, and such determinations are to be disturbed only where they are found to be clearly erroneous.

[9] Appellant points to the law judge's observation that appellant's mother's testimony was "not credible, but self-serving to respondent," and argues, essentially, that the law judge created an impossible standard by forcing appellant to disprove a negative proposition (that he didn't receive the messages from MDC) whilst appellant's mother's and appellant's testimony would be given little weight because it was deemed "self-serving." We might be inclined to agree in different circumstances with this argument, but, in the context of this case, we think it takes the law judge's comment out of context of his overall evaluation of the record. It is clear to us that the law judge was simply observing that, standing alone, without additional documentary or other corroborating evidence (such as, for example, proof of power outages actually occurring in a manner to explain the loss of each message), the self-serving claim to have not received four separate messages was simply not credible. Compare Administrator v. Schmidt, et al., NTSB Order No. EA-4025 at n.4 (1994) ("Naturally, a judge is entitled to consider a witness's interest in a proceeding in weighing credibility and we would assign no fault for so doing. But just as certainly, we cannot establish a mechanical standard under which the testimony of the least interested observer is *automatically* given the most weight regardless of its objective worth, as this is a formula under which respondents, however truthful, could rarely succeed.") (emphasis added).

See, e.g., Administrator v. Smith, 5 NTSB 1560, 1563 (1986) (the Board defers to credibility findings of law judges absent a showing that they were clearly erroneous); Commandant v. Purser, 5 NTSB 2597, 2598 (1986) ("That the conflicting evidence … could have been weighed or resolved differently provides no basis for disturbing the credibility determinations in fact reached by the law judge, who, within his exclusive province as trier of fact, personally observed the demeanor of the witnesses as they testified, and whose judgment, based on such observation, should not be overturned, as the Vice Commandant ruled, unless inherently incredible."). In light of this standard of review, appellant demonstrates no basis for us to disturb the law judge's credibility-based finding that appellant received actual notice from MDC between September 10th and September 12th to report for drug testing.

Indeed, we note that far from evidence of a clearly erroneous credibility determination, this record contains evidence in support of the law judge's finding against appellant's and appellant's mother's testimony. For example, appellant's mother testified that the message she received on September 27th (allegedly the only message she received) was from MDC and left by a female, but the other evidence indicates that Judy Shaw, who left the September 10th, 11th, 12th, and 20th messages from MDC, did not call after September 20th, and,

instead, the president of MCBCA, a male, contacted appellant on or about September 27th. Similarly, the general information about weather appellant did submit for the record appears to indicate that the first severe weather, which appellant's mother cited as a likely reason they did not receive messages left on the answering machine, did not approach the area until September 13th, or after the MDC messages relevant to the Coast Guard's charges were left on three consecutive days on the answering machine.

Finally, appellant and appellant's mother testified that appellant's mother first told appellant about the message she allegedly first received from MDC on Saturday morning (after MDC business hours, it appears); however, appellant's transcribed phone call to MDC that same Saturday indicates that he, "ha[d]n't really had time to be doing any drug testing 'cause I'm trying to get mechanical work done," a statement which makes little sense unless appellant knew about MDC's request at a point when he actually could have come to MDC during business hours (i.e., prior to Saturday, September 28, when he purportedly first learned of the drug testing request). Our point here is not to draw definitive conclusions from these observations, a task we reserve for the law judge, but, rather, to register our view that appellant's argument falls far short

of demonstrating, as he must, that the law judge's credibility determinations were clearly erroneous.

Next, appellant argues that MDC was required to, but did not, "notify [appellant] that he … refused to test," and, therefore, the Coast Guard's case is fatally flawed. The DOT drug testing regulations define a "refusal to test" as (among other things not relevant to this case):

> Fail[ure] to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA[10] (see Sec. 40.61(a)).

49 C.F.R. 40.191(a)(1). Section 40.61 describes "preliminary steps in the collection process" and lists the "steps" a "collector" must take "before actually beginning a collection," including those outlined, in relevant part, in subsection (a):

> In a situation where a C/TPA has notified an owner/operator or other individual employee to report for testing and the employee does not appear, the C/TPA must notify the employee that he or she has refused to test (see Sec. 40.191(a)(1)).

[10] Consortium/Third-Party Administrator. MDC is the C/TPA. Ex. IO-2; Tr. at 23, 58-59; see 49 C.F.R. 40.3. MCBCA is appellant's "employer" for purposes of administering the DOT testing program. Id.

49 C.F.R. 40.61(a). Appellant argues that there is, "no evidence that the requirements of section 40.61(a) were met," because MDC did not, in the language of the regulation, "notify [appellant] that he … ha[d] refused to test."

The Vice Commandant and the law judge -- who appear to not have addressed the factual predicate to appellant's argument; specifically, that MDC did not notify appellant that he had refused a test -- concluded that the notification provision was not, in the words of the Vice Commandant, "an element of [appellant's] 'refusal to submit' but, rather, a requirement placed on the C/TPA." Appellant argues that the Vice Commandant's interpretation would render the C/TPA notification language "essentially meaningless" and suggests, without providing support, that the language's purpose is to, "ensure that the person selected for testing has, in fact, received actual notice that he has been so selected and to give that person an opportunity to submit to testing." We might be inclined to explore appellant's argument with greater vigor[11]

[11] See Final Rule, "Procedures for Transportation Workplace Drug and Alcohol Testing Programs," 65 Fed. Reg. 79462, 79489 (December 19, 2000) ("With respect to employees who showed up late for a test or not at all, several commenters said it was common for employees not to have appointments. As a result, employees simply appeared at the collection site, and collection site people had no notion whether they were on time or not. Commenters suggested that the proposed 'no show' provision be limited to situations in which the collection site was at the employee's worksite or an appointment had been scheduled. We

were we not convinced that this record demonstrates that the notification contemplated by section 40.61(a) did, in fact, occur.

Although appellant argues, essentially, that the first notice he received that MDC wanted him to come in for drug testing was on September 28th, that claim was not credited by the law judge. Thus, in contrast to appellant's discredited claim to have not received actual notice from MDC, MDC was shown to have left appellant four messages (on September 10th, 11th, 12th and 20th) indicating he should promptly report for drug testing. More importantly, the record contains testimonial and documentary evidence that MDC contacted the president of MCBCA regarding the problems it was having with appellant, and the MCBCA president reported back to MDC that he left a message for appellant on appellant's cell phone indicating that appellant needed to report to MDC by the next business day or the matter would be turned over to the Coast Guard.[12] In short, we think

(continued)
agree, and have added language to this effect [in section 40.61]."").

[12] There is no indication that appellant did not receive this notification from the MCBCA president, and, indeed, all appearances are that it was this message that prompted his after-hours voicemail to MDC on September 28th. To be sure, for appellant to claim otherwise would even further hurt his case since this record indicates that no other messages regarding MDC testing were left for appellant between September 20th and the MCBCA president's message on September 27th.

that this message from the MCBCA president was a clear communication on behalf of MDC that appellant's failure to respond to MDC was being, or was about be, considered a transgression of the DOT drug program requirements. In light of this evidence, we find appellant's arguments that he was not notified pursuant to the language in section 40.61 to be unavailing.

Finally, appellant argues that revocation, under the circumstances, is an excessive penalty not justified by the facts of this case. The range of sanction set forth in the Coast Guard's guidance table in 46 C.F.R. 5.569 indicates a 12- to 24-month suspension for regulatory violations pertaining to refusal to take a drug test. The regulation states that the guidance is, "for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered." It further states that the sanction table lists the range of sanction "considered appropriate" by the Coast Guard, but that mitigating or aggravating factors may justify a sanction greater or less than the given range.

In this case, neither the law judge nor the Vice Commandant articulated any aggravating factors that would justify going beyond the sanction range listed in the Coast Guard's regulatory guidance. While they both cited two prior cases in which

revocation was imposed for refusal to submit to a drug test,[13] they did not explain why the instant case warranted a sanction beyond the range given in the sanction table. Rather, both decisions merely cited the language in the rule permitting departure from the sanction range in the event aggravating factors are present without describing what those factors were in this case. The law judge included in his sanction discussion a recitation of the facts that led him to find that appellant had failed to comply with the ordered drug test, but made no finding that any of them constituted aggravating factors. The Vice Commandant cited the law judge's reasoning on the sanction issue, and concluded (at p. 15 of his decision) by stating:

> If mariners were allowed to refuse to submit to random drug tests and face any order less than revocation, the intent of the Coast Guard's drug testing regulations would undoubtedly be thwarted. Accordingly, I find that the ALJ did not err in assessing a sanction of revocation in this case.

This statement essentially constitutes a policy of automatically supporting revocation in every case when a mariner has refused to submit to a random drug test. Such a policy,

---

[13] It should be noted that neither of these cases involved random drug tests. Further, they arguably involved some aggravating factors that are not evident in the record of this case. The Downs case (Appeal Decision 2624) apparently involved a mariner who failed to appear for a drug test that was ordered after the Coast Guard received evidence of recent alcohol and/or drug use. The Callahan case (Appeal Decision 2578) involved a mariner who departed the scene of an accident after being specifically ordered to remain pending a post-accident drug test for cause.

while perhaps a sensible one, is in conflict with the Coast Guard's articulation of a 12-24 month suspension as the "appropriate" sanction, absent mitigating or aggravating factors. Thus, unless and until the Coast Guard changes its regulation, we will not uphold an upward departure from the policy currently embodied in the Coast Guard's regulation without a clearly articulated explanation of aggravating factors. Accordingly, we will modify the sanction in this case from revocation to a 24-month suspension.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is denied in part and granted in part;

2. The appellant's request for oral argument is denied[14]; and

3. The decision of the Vice Commandant is affirmed as to the finding of misconduct and modified as to sanction (from revocation to a 24-month suspension of appellant's merchant mariner document).

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS and HERSMAN, Members of the Board, concurred in the above opinion and order.

[14] The issues are adequately addressed in the record and the briefs, and oral argument would not aid in our decision of this case.